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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

ERNEST KENDALL SCOTT,

Defendant and Appellant.

B202231

(Los Angeles County Super. Ct.
No. MA028813)

APPEAL from a judgment of the Superior Court of Los Angeles County, Bob S. Bowers, Jr., Judge. Affirmed as modified.

Susan K. Keiser, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Theresa A. Patterson and Yun K. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

The jury found defendant Ernest Kendall Scott guilty of the first degree murders of Charles Trice on October 9, 2003, and Victoria Gnerlich on July 27, 2003 (Pen. Code, § 187, subd. (a)).¹ The jury returned true findings of burglary and robbery special circumstances as to both murders (§ 192, subd. (a)(17)), along with a multiple murder special circumstance (§ 190.2, subd. (a)(3)).² Defendant was also convicted of grand theft of an automobile (§ 487, subd. (d)(1)), first degree robbery (§ 211), and first degree occupied burglary (§§ 459, 667.5, subd. (c)(21)) in connection with the Trice murder. As to the Gnerlich incident, the jury also found defendant guilty of first degree robbery and first degree occupied burglary. The jury fixed defendant's punishment at life imprisonment without the possibility of parole for both murders following a penalty phase trial. In addition to the two life terms without parole, the trial court imposed a two-year midterm sentence for the grand theft auto conviction. The court imposed the midterm as to all remaining counts, but stayed the sentences pursuant to section 654. A five-year enhancement was imposed for a prior serious felony conviction under section 667, subdivision (a)(1).³

In his timely appeal, defendant contends the trial court erred in denying his motion to suppress his custodial statements to the police on the ground that the interrogating officers failed to obtain defendant's waiver of constitutional rights under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). Defendant also contends the court improperly imposed the five-year serious felony enhancement. Defendant's *Miranda* claim fails, but we agree the five-year enhancement must be stricken. In all other respects, the judgment will be affirmed.

¹ All statutory references are to the Penal Code, unless otherwise stated.

² The information named Ronnie Edward Johnson, Jr., as a codefendant to all the offenses arising out of the Trice murder. Codefendant Johnson was separately tried.

³ The court dismissed a prior prison term enhancement allegation (§ 667.5, subd. (b)).

STATEMENT OF FACTS

The Trice Murder

Trice's daughter, Patricia,⁴ visited him at least once a week at his home in Little Rock, near Palmdale, where he lived alone. He always locked his front gate after dark and kept a wallet with cash and identification in the back pocket of his pants. Trice had a collection of handguns and rifles in his home, and usually kept a handgun in his car or truck. At approximately 9:30 p.m. on October 9, 2003, Patricia stopped by her father's home. The front and back gates were open and the porch light was on, as was the living room light. As Trice's Ford Contour was not in the driveway, she assumed he had gone out for a short time. She waited for him in her car at the front gate for approximately 15 minutes before deciding to drive home.

The following morning, not having heard from her father and thinking something might be wrong, Patricia drove back to Trice's home. Her suspicions were confirmed when she saw the Ford was missing, the gates still open, and the lights still illuminated, just as it was the night before. She got out of her car and noticed the television volume was very loud. The front door was unlocked. She pushed it ajar and saw her father's dead body on the floor, face down, his ankles and wrists covered with duct tape.⁵ Patricia returned to her car, called the 9-1-1 operator on her cellular phone, and reported what she had seen.

Sheriff's Deputy Richard Engles was assigned to East Palmdale. He was a longtime resident of that area and was very familiar with the Little Rock and Pearblossom communities. At 10:00 a.m. on October 10, 2003, he responded to the Trice

⁴ Throughout this opinion, we will refer to witnesses by their first names when necessary to avoid confusing them with others who share their surnames.

⁵ DNA on the duct tape matched that of Johnson.

residence. He and his partner found Trice as described by Patricia. Lifting a blanket from Trice's head, the deputy verified that Trice was dead. Although the residence had not been ransacked, Trice's wallet was missing—indeed, the back pocket of his pants had been ripped off. Detective Shannon Laren of the Los Angeles County Sheriff's Department responded to the scene some hours later and took part in the crime scene investigation. There were three rifles found in the bedrooms. No handguns were found in the home or car, but there was handgun ammunition in one of the bedrooms.

Cynthia Young was Trice's friend and neighbor. On the early morning of October 9, she saw Trice pull his truck through his front gate and relock it as he usually did. Trice typically kept his front gate locked while at home, relocking it behind him when leaving. Later that day, between 5:00 p.m. and 6:00 p.m., Trice returned, unlocked the gate, drove through, relocked it, and walked to the back of his home. The next morning, she was wakened by police activity at Trice's house. She assisted them by looking after Trice's dog, which the police had trouble securing.

Medical examiner Dr. Jeffrey Gutstadt determined Trice was 76 years old at the time of his death. He had suffered blunt force trauma, causing lacerations, contusions, and abrasions to his head and back. His larynx had been fractured due to a large amount of pressure. Damage to Trice's eyes confirmed that he had been strangled. Asphyxiation was the main cause of death (a plastic bag found near his body had aspirated blood inside), with the blunt force trauma as a contributing factor.

At approximately 8:00 p.m. on October 10, Detective Laren went to the location where Trice's Ford had been located—in the open desert within two miles of his home. The front passenger seat had been burned. A burnt rag was found on the center console. Two matchbooks folded together were found on the backseat. Sergeant John Ament, an arson investigator with the sheriff's department, testified that the interior of the Ford Contour had been partially burned by someone placing an open flame on the front passenger seat area—most likely a burning piece of rolled up notebook paper. The fire

extinguished itself because the car doors were shut and windows had been rolled up, limiting the availability of oxygen.

When Detective Laren and Deputy Dale Falicon returned in the daytime, they found the imprints of shoes in the sand next to the Ford. Deputy Falicon photographed the footprints and made plaster casts of them. A search of defendant's residence in early May of 2004 (the week defendant was arrested) revealed "a bunch of shoes piled inside" a bathtub. Deputy Stephen Schliebe compared a Dominator brand shoe recovered from defendant's residence with the casts and determined that it, or another shoe of the same sole design, size, and general wear, could have made two of the desert imprints. The sole design was unique to that brand of shoe.

Gnerlich Incident

Gnerlich owned and operated an antique store in Little Rock on the Pearblossom Highway. She was 46 years old, five feet four inches tall, suffered from multiple sclerosis, and had difficulty walking, often using a cane. A jar for donations to the Multiple Sclerosis Society was kept on the counter. Two or three days a week, Sandra Fry sold antiques from a booth inside Gnerlich's shop. She and Gnerlich typically kept about \$40 for change in the register. Large amounts of currency from sales would be hidden in antique books shelved behind the register. She and Gnerlich kept the shop neat. At the time of the killing, Gnerlich was living in the store with her dog. When Fry arrived at the shop after the incident on July 27, 2003, the cash register was gone and the area behind the counter was in disarray.

When Deputy Engels arrived at the store on July 27, he saw the front door had been kicked open. Just inside was a broken canoe paddle. There were three blood spots on the entranceway. The area behind the front counter had been ransacked. Gnerlich's dead body was lying on the hallway floor, with blood pooled around her head. There

was blood smeared on a light switch and bloody footprints trailing from the hallway to the back of the shop, where he saw a broken, bloody clay pot.

Gnerlich had been severely beaten. Her nose, cheekbones, jaw, and skull had been fractured by blunt force trauma, causing serious facial deformity along with multiple contusions, abrasions, and lacerations. The broken pottery found at the crime scene could have been used to cause some of the head wounds. The injuries were too serious to have been the result of a fall. She had contusions on her chest, along with defensive injuries to her arm and hand. The blunt force injuries to her head caused her death.

Detective Todd Anderson of the sheriff's department arrived at the scene at approximately 5:00 p.m. A piece of plastic covering from the cash register was on the ground in the parking area next to the victim's antique store. Apart from the few areas of the store that had been ransacked, including the space behind the front counter and the area near the front door, the store was perfectly neat and clean. An empty, lidless jar for donations to the Multiple Sclerosis Society was on the floor behind the counter, where the ransacking had occurred. A fingerprint expert with the sheriff's department, determined that defendant's fingerprint had been left on the donation jar. A bloodied and empty cashbox was also found nearby. In the back room of the shop where Gnerlich slept, the detective found a pillow with a bloody footprint, along with broken, bloodstained pottery. Some of the bloody shards had hair on them appearing to match Gnerlich's. Paul Coleman, a sheriff's department criminalist, determined the bloodstains from the cash box, a shirt, door, and from the light switch matched defendant's DNA profile.

The cash register and Gnerlich's purse were found in a dirt field within seven miles of her store—and “only a couple blocks” from defendant's residence. Neither the register nor the purse contained any money.

Additional Investigation and Defendant's Statements

Anton James had been in jail since May 2007 for a probation violation, but was scheduled to be released soon after the trial. He had been married to defendant's sister for a few years, but they later separated. Defendant lived with them during their marriage and introduced Anton to codefendant Johnson. Anton was a friend of Trice since Anton's childhood. During a car ride with defendant and Johnson, Anton overheard Johnson ask defendant whether he wanted to rob Trice. Later, after hearing that Trice had been killed, Anton told his father, Hassan James, about the prior conversation. Although Anton denied having any further conversations with defendant concerning the Trice or Gnerlich incidents, Anton admitted that defendant called him late one night "[s]ometime around the death of Charles Trice," requesting a ride home. Defendant was in the company of Johnson. Defendant offered Anton some marijuana for the ride, but Anton declined the request. During Johnson's trial, Anton testified that he told his father that Johnson "was bragging about killing Charles Trice."

Hassan James met defendant through his son Anton. Hassan had been Trice's close friend for 30 years. While Anton, defendant, and Johnson were visiting Hassan's home prior to Trice's killing, Johnson asked Hassan to borrow a roll of duct tape. Hassan gave him the tape. Hassan learned about Trice's death from Anton, while Johnson and defendant were visiting his home. Anton told Hassan that defendant's brother said defendant and Johnson killed Trice—they "duct taped him and choked him and killed him in his house." Hassan relayed that information to Deputy Engles. The deputy testified that Hassan told him he heard the victim was beaten and smothered even though the manner of Trice's death had not been made public. Hassan then asked if a female store owner in Little Rock had been killed. When the deputy affirmed it, Hassan told him that his son had said a person named Ernest bragged he "had beaten her so bad that the coroner had to identify her."

Detective Laren interviewed defendant on April 29, 2004, while defendant was in custody. Prior to that time, the detective had made arrangements to meet with defendant, but defendant never showed up. Before the interview, defendant was advised of his *Miranda* rights, including the rights to remain silent and to have counsel. Defendant said he understood those rights. The interview was tape recorded. Defendant admitted being friends with Johnson since 2002. He also admitted knowing Trice and having been to Trice's home the day of the murder after going fishing together. Defendant initially denied any knowledge of the Trice killing. Later, defendant said he gave Johnson some duct tape because Johnson planned to do a "lick" (robbery). As the detective continued to question him, defendant said a person named Shane Williams and Johnson committed the robbery and murder. When the detective told defendant that Williams was in jail, defendant became upset and changed his story again.

Defendant next said he agreed to be the getaway driver for Williams and Johnson, who had asked him to assist them in robbing Trice. Defendant was driven to the Trice home and stayed in the doorway, while Johnson struck Trice in the head with a handgun. Williams instructed defendant to tape up Trice's legs, but defendant ran home. As the interview progressed, defendant gave additional details concerning the criminal acts he attributed to Williams and Johnson, including the manner in which they attacked the victim and robbed him of money and narcotics. Defendant, however, maintained he remained in the doorway. The interview lasted four to five hours. Pursuant to a court order, Detective Laren obtained a DNA sample from defendant.

After a short break, Detectives Anderson and Richard Longshore questioned defendant concerning the Gnerlich killing. A redacted version of the audiotape interview was played to the jury. Initially, defendant denied ever being inside Gnerlich's store. The detectives, however, said they did not believe him. They were in the process of assessing DNA and fingerprint evidence which they believed would show defendant was at the store and took part in the robbery and murder. Defendant admitted having been to the store on an occasion earlier that year, but insisted he had never gone inside. Later, he

admitted kicking the door down and running away. When he saw the police did not respond, he went inside and took the cash register. He saw an “ankle-biter dog” inside.⁶ At first, he denied touching the victim, but admitted cutting his finger badly and bleeding. Later, he admitted striking the victim after she surprised him by attacking him with her cane. In a subsequent interview that day, defendant admitted that his blood would be at the scene and that he struck the victim twice, with his fist and elbow. Defendant said he would like to apologize to the victim’s family because he did not intend to kill her.

On May 6, Detective Laren conducted another interview of defendant, during which defendant made a drawing of the scene of Trice’s killing. The layout of the furniture, as well as the placement of Trice’s body and a piece of bloody grey duct tape, corresponded to the detective’s observations of the crime scene. Defendant maintained that it was Johnson who attacked Trice and ripped Trice’s wallet from his pants. Defendant tried to tape Trice’s mouth, but found there was too much blood to do so. The day after the incident, defendant helped Johnson burn Trice’s car in the desert.

The jury also heard portions of two surreptitiously recorded jailhouse conversations between defendant and Johnson of December 5 and 12, 2004. In the first, defendant accused Johnson of telling the police that defendant “killed that bitch on [Highway] 138.” Johnson denied it. Defendant said he believed another inmate named “Break” had informed on them. Defendant planned to “smash” Break before the latter was released. In the second conversation, they discussed Anton’s testimony at Johnson’s preliminary hearing. Defendant recalled a conversation at Johnson’s house in which Anton told them that he and his cousin “robbed him before.”

⁶ Detective Anderson confirmed that Gnerlich owned such a small dog.

DISCUSSION

Miranda Claim

Defendant contends the admission of his custodial admissions and confessions to detectives violated his Fifth Amendment privilege against self-incrimination and the related protections afforded to defendants under *Miranda*, due to lack of an affirmative statement of waiver by defendant. As we explain, his claim fails because neither the federal nor the California Supreme Court precedent requires an express waiver. Rather, the settled precedent of both high courts recognizes implicit waivers under circumstances analogous to those presented below.

Defendant filed his suppression motion on June 11, 2007, asserting the prosecution could not show he made a voluntary, knowing, and intelligent waiver of his *Miranda* rights. At the hearing on July 3, 2007, the prosecution called Detective Laren as its witness. The parties agreed the court could also consider the tape and transcript of the April 29, 2006 interview by Detectives Anderson and Longshore, which occurred after Detective Laren's interrogation.⁷

Detective Laren testified that he interviewed defendant after his April 29 arrest.⁸ The detective advised defendant of his *Miranda* rights by reading the sheriff department's standard form and asked defendant whether he understood each of those rights. However, the detective did not ask defendant whether he gave up those rights. Detective Laren explained that the circumstances of his advisement were the same as

⁷ The record does not make it clear whether other interview transcripts were considered.

⁸ At a prior suppression hearing concerning the legality of defendant's arrest, Detective Shannon testified that defendant had an outstanding arrest warrant for marijuana possession and was on parole. On April 29, 2004, defendant was arrested for violating his parole.

recorded in the subsequent interview on May 6, 2004. At that time, before the interview began, defendant acknowledged that he had been read his rights before, and separately affirmed that he understood his right to remain silent, that anything he said “may be used against you in court,” that he had the right to counsel, and to appointed counsel if he could not afford to retain a lawyer.

Detective Laren further testified that at the time of the April 29 advisement, defendant had not been arrested for the Trice murder, but the detective had previously spoken to him on the telephone and told him that he wanted to discuss the Trice murder. Defendant said nothing about being tired or under the influence of drugs. The interview took place in the afternoon, “within a couple hours” of defendant’s arrest, and defendant did not appear to be under the influence of any substance. He did not appear mentally disturbed or emotionally impaired in any way. At one point during the interview, while describing the way in which Johnson struck Trice’s head, defendant became visibly upset. The detective suggested they take a break for defendant to “gather his thoughts.” On defendant’s request, the detective gave him a glass of water, and the interview resumed approximately 30 minutes later.

In addition to information summarized in the statement of facts, the transcript of the April 29 interview with Detectives Anderson and Longshore shows that Detective Laren referred to himself as the investigator on the “Trice case” and mentioned that he was working on another case in Little Rock. At the interview’s conclusion, defendant apologized to the detectives for taking so long to admit what he had done. He agreed with the detectives that they had not “threatened” or “sweated” him during the interview.

At the hearing’s conclusion, the trial court explained that it had listened to the audiotaped interview and reviewed the transcript. Based on its evaluation of that evidence and the detective’s testimony, the court denied the suppression motion, finding defendant made a knowing, intelligent, and voluntary waiver.

The applicable legal standards are well established. “In *Miranda, supra*, 384 U.S. 436, the United States Supreme Court ‘recogniz[ed] that any statement obtained by an

officer from a suspect during custodial interrogation may be potentially involuntary because such questioning may be coercive’ and ‘held that such a statement may be admitted in evidence only if the officer advises the suspect of both his or her right to remain silent and the right to have counsel present at questioning, and the suspect waives those rights and agrees to speak to the officer.’ [Citation.] The *Miranda* safeguards apply to confessions and ‘statements which amount to “admissions” of part or all of an offense’ regardless of whether they are exculpatory or inculpatory in nature. (*Miranda, supra*, 384 U.S. at pp. 444, 476-477.)” (*People v. Guerra* (2006) 37 Cal.4th 1067, 1092.)

“In reviewing defendant’s claim that his *Miranda* rights were violated, we must accept the trial court’s resolution of disputed facts and inferences, as well as its evaluation of the credibility of witnesses where supported by substantial evidence. [Citations.] *Miranda* makes clear that in order for defendant’s statements to be admissible against him, he must have knowingly and intelligently waived his rights to remain silent, and to the presence and assistance of counsel. (*Miranda, supra*, 384 U.S. at p. 475.)” (*People v. Cruz* (2008) 44 Cal.4th 636, 667 (*Cruz*).)

Defendant’s chief argument is that no valid *Miranda* waiver can be found absent his affirmative statement to that effect. “It is . . . settled, however, that a suspect who desires to waive his *Miranda* rights and submit to interrogation by law enforcement authorities need not do so with any particular words or phrases. A valid waiver need not be of predetermined form, but instead must reflect that the suspect in fact knowingly and voluntarily waived the rights delineated in the *Miranda* decision. (See *North Carolina v. Butler* (1979) 441 U.S. 369, 373.)” (*Cruz, supra*, 44 Cal.4th at p. 667.) In *People v. Whitson* (1998) 17 Cal.4th 229, 246-247, our Supreme Court thoroughly reviewed the applicable United States Supreme Court precedent and concluded a valid waiver of *Miranda* rights may be express or implied. (See *Cruz, supra*, 44 Cal.4th at p. 667.)

“Although there is a threshold presumption against finding a waiver of *Miranda* rights (*North Carolina v. Butler, supra*, 441 U.S. at p. 373), ultimately the question becomes whether the *Miranda* waiver was knowing and intelligent under the totality of

the circumstances surrounding the interrogation.” (*Cruz, supra*, 44 Cal.4th at p. 668, citing *Oregon v. Bradshaw* (1983) 462 U.S. 1039, 1044-1046 (plur. opn. of Rehnquist, J.); *People v. Clark* (1993) 5 Cal.4th 950, 986.) An implicit waiver can therefore be found by examining the facts and circumstances of the case, including the defendant’s background, experience, and conduct. (See *North Carolina v. Butler, supra*, 441 U.S. at p. 373; *People v. Whitson, supra*, 17 Cal.4th at p. 247.)

More specifically, “[a] suspect’s expressed willingness to answer questions after acknowledging an understanding of his or her *Miranda* rights has itself been held sufficient to constitute an implied waiver of such rights.” (*Cruz, supra*, 44 Cal.4th at p. 667; see, e.g., *People v. Sully* (1991) 53 Cal.3d 1195, 1233 [defendant impliedly waived his *Miranda* rights when, after having been admonished of those rights, responded affirmatively that he understood them and gave a tape-recorded statement to a detective].) That was the situation here. The trial court credited Detective Laren’s testimony that defendant acknowledged that he understood each of his *Miranda* rights before willingly answering the detectives’ questions. Our review of the record confirms the absence of any substantial indicia of deception, undue pressure, or coercion by the detectives. (See *People v. Whitson, supra*, 17 Cal.4th at pp. 248-249.) Indeed, at the close of the April 29 interrogation, defendant stated that had not been coerced. Considering the totality of circumstances surrounding the interrogations, we find defendant acknowledged he understood his *Miranda* rights, and his willingness to answer questions after expressly affirming that understanding constituted a valid implied waiver of them. (See *Cruz, supra*, 44 Cal.4th at pp. 668-669.)

In connection with the suppression motion, defendant did not identify any aspect of the detective’s conduct as effectively rendering his statements involuntary. As such a claim was never raised or developed below, it is not preserved for appeal. (*Cruz, supra*, 44 Cal.4th at p. 666, citing *People v. Maury* (2003) 30 Cal.4th 342, 387-388; *People v. Mayfield* (1993) 5 Cal.4th 142, 172.) In any event, the record discloses no coercive police activity. On appeal, defendant makes passing reference to the May 6 interview in

which defendant and Detective Laren discussed threats against defendant or his family. At the early stage of the interview, after receiving the *Miranda* advisement, defendant said he needed protective custody due to Trice's "people." The detective said he could provide such protection, but there was no indication the *Miranda* waiver was conditioned on the provision of protective custody. Further, the detective stated that he could not promise defendant any leniency. In short, defendant fails to show the existence of the kind of coercive police activity that would support a finding of involuntariness. (*Cruz, supra*, 44 Cal.4th at p. 669.)

Finally, we note that as to the Gnerlich murder and related crimes, any *Miranda* error would have been harmless whatever the standard applied in light of the unchallenged DNA and fingerprint evidence tying defendant to those crimes.⁹

Sentencing Claim

Defendant contends—and the Attorney General concedes—the trial court improperly imposed the five-year enhancement under section 667, subdivision (a)(1) because there was no admission or finding that defendant suffered a prior serious felony conviction. We accept the concession and vacate imposition of the enhancement.

At the start of trial, the trial court ordered bifurcation of the recidivist allegations. However, the allegations of two prior serious felonies under section 667, subdivision (a)(1) and a prior prison term allegation under section 667.5, subdivision (b) were never

⁹ While the circumstantial evidence of defendant's participation in the Trice offenses was substantial, defendant's confession was so compelling as to his presence during the killing that had there been error, which there was not, we would not find its admission would have been harmless beyond a reasonable doubt. (See *Arizona v. Fulminante* (1991) 499 U.S. 279, 307-308.)

submitted to the jury.¹⁰ Defendant did not admit the allegations. After the jury returned its penalty verdict, the court asked counsel what they wanted to do concerning the “strike priors.” Defendant’s counsel conferred with the prosecutor, and they agreed that prior convictions would be stricken pending the continued validity of the judgment.¹¹ The court accepted the parties’ stipulation that “the strike priors . . . will be stricken by agreement.” Nevertheless, the court imposed the five-year enhancement under section 667, subdivision (a)(1), finding the allegations had been found true. The court dismissed the prior prison term enhancement (§ 667.5, subd. (b)).

As there was no finding, implicit or otherwise, on the serious felony enhancement allegation, imposition of the enhancement must be vacated. (§ 1158; see *People v. Jackson* (1985) 37 Cal.3d 826, 836, overruled on another ground in *People v. Guerrero* (1988) 44 Cal.3d 343.)

¹⁰ As part of the prosecution’s penalty phase case for an aggravated sentence, documents verifying defendant’s criminal history were presented—a juvenile sustained petition for robbery in 1996 and another robbery conviction in 2000.

¹¹ The prosecutor apparently misspoke in referring to the “continuing validity of the plea,” rather than judgment.

DISPOSITION

The five-year enhancement under section 667, subdivision (a)(1) is stricken. A corrected abstract of judgment shall be prepared and forwarded in a timely fashion to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

KRIEGLER, J.

We concur:

TURNER, P. J.

MOSK, J.